Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

ADVANCE LEASING AND DEVELOPMENT, INC., PETER A. GERACI and ROY N. GERACI,

Petitioners,

v.

CHRIS HART, in his official capacity as a Commissioner of Hillsborough County, JOSEPH CHILLURA, in his official capacity as a Commissioner of Hillsborough County, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Eleventh Circuit's after-the-fact, hypothetical consideration of *any conceivable* justification for a local government's zoning denial, at summary judgment *without trial by jury*, conflicts with this Court's requirement of a jury trial to examine the *reasonableness* of the local government's *proffered* justifications, as established in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 119 S. Ct. 1624 (1999) ("*Del Monte Dunes*").

Whether the Eleventh Circuit's refusal to recognize a due process takings claim is in direct conflict with this Court's decision in *Del Monte Dunes* which expressly holds that a due process takings claim is cognizable under 42 U.S.C. § 1983.

PARTIES TO THE PROCEEDING

Petitioners are Advance Leasing and Development, Inc., a Florida Corporation, Peter A. Geraci and Roy N. Geraci.

Respondents are Hillsborough County through its Board of County Commissioners, and the Department of Community Affairs of the State of Florida.

STATEMENT PURSUANT TO RULE 29.6

Petitioner, Advance Leasing and Development, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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Petitioners respectfully petition for a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals in this case.

OPINIONS BELOW

The opinions of the Court of Appeals and District Court are unreported but are included herein at Appendix A and Appendix B.

STATEMENT OF JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was entered on May 19, 2000, sustaining a Summary Judgment in favor of Respondents entered by the United States District Court for the Middle District of Florida on September 21, 1998. The Court of Appeals subsequently entered an order denying a petition for rehearing and petition for rehearing en banc on July 24, 2000. (App. C).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves substantive due process, equal protection and due process takings claims framed within the context of 42 U.S.C. § 1983.

The Fourteenth Amendment to the United States Constitution, Section 1, states in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens

> of the United States; nor shall deprive any person of life, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

The Fifth Amendment to the United States Constitution states in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

42 U.S.C. § 1983 states in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

This case involves a federal constitutional and statutory attack, by the landowners and proposed developer, upon Hillsborough County's refusal to grant rezoning and development order approval which would have enabled Petitioners to construct a regional shopping mall upon property in Hillsborough County, Florida, *after the land*

already was approved by the County and the State of Florida *for regional commercial land use* pursuant to state and local law governing Comprehensive Land Use Plans. Petitioners were denied trial by jury when summary judgment was entered against them by the District Court. During the Petitioners' appeal to the Eleventh Circuit, this Court rendered *Del Monte Dunes, supra*. Petitioners brought *Del Monte Dunes* to the attention of the Eleventh Circuit, via notice of supplemental authority and during oral argument, and emphasized that *Del Monte Dunes* effectively overruled numerous Eleventh Circuit decisions and compelled a reversal of the summary judgment entered by the District Court in this case. The Eleventh Circuit disregarded this authority in affirming the summary judgment, and did not revisit its numerous decisions in conflict with *Del Monte Dunes, supra*, despite Petitioners' request to do so.

Peter A. Geraci and Roy N. Geraci, Jr. (the "Geracis") are second generation owners of the land in question. In May of 1988, the Geracis entered into a contract to sell Forbes-Cohen Development Corporation ("Forbes-Cohen"), a national mall developer, a portion of the Geraci land for the development of a regional shopping mall. The purchase was contingent upon receiving developmental approval from applicable governmental authorities. Pursuant to Florida law, Forbes-Cohen filed an application for development approval ("ADA") with the Tampa Bay Regional Planning Council for a development of regional impact ("DRI"), and a related application with Hillsborough County, for the rezoning of the mall site. The Forbes-Cohen application also included a request for Hillsborough County to amend the Comprehensive Plan *land use* designation on the Geraci land from agricultural to regional commercial (R/C), which would allow the retail mall use.

On January 5, 1989, Hillsborough County *adopted* a Comprehensive Plan *land use* designation of regional commercial (R/C) expressly for the Geraci land, *which allowed* the type of regional mall requested by Forbes-Cohen. Moreover, in December of 1989, the County created a North Dale Mabry Corridor Plan that specifically designated the Geraci land as a "major activity center," which contemplated its use as a regional mall. Forbes-Cohen then assigned its contract and development rights to Advance Leasing and Development, Inc. ("Advance Leasing") (Advance Leasing and the Geracis are collectively referred to as "Petitioners"). Advance Leasing filed an updated ADA for the mall site on February 28, 1992, and filed its own rezoning application, seeking *rezoning* approval *consistent with* the regional commercial (R/C) *land use* designation previously adopted by the County and approved by the State.[1]

As precisely was the case in *Del Monte Dunes*, the County over a five-year period repeatedly imposed conditions and exactions upon Petitioners at each stage of the approval process. Each time, as in *Del Monte Dunes*, the Petitioners capitulated and agreed to the condition or exaction. Ultimately, the Petitioners satisfactorily addressed

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1. In Florida, there are two levels of approval for use of land: (1) the land use designation, which is the planning category regulated by each county's Comprehensive Plan under Chapter 163, Fla. Stat., and reviewed by the Florida Department of Community Affairs, which establishes permissible density of use; and (2) the site-specific zoning category which is an overlay that must fall within the density parameters of the underlying land use designation. The approved Comprehensive Plan land use designation typically will allow any of several, more specific, zoning uses on a given piece of property. In this case, the regional commercial (R/C) land use already approved for the Geraci land expressly allowed the zoning category requested for a regional mall.

all potential issues related to the development order and rezoning application: wetlands, upland habitat protection, storm water management, traffic management and access, public water and wastewater, parking, well field impact, public transportation, and all other developmental issues raised by the various government agencies. All twenty-six review agencies having jurisdiction, *other than Hillsborough County* (whose own expert staff recommended approval), finally recommended approval of the project.

After extensive negotiations with County staff, the staff of the Hillsborough County City-County Planning Commission ("Planning Commission"), and the other governmental bodies, Petitioners brought their rezoning application before a Zoning Hearing Master ("ZHM") designated by the County, who recommended denial despite Petitioners' concession on every point, and notwithstanding the recommendation for approval by all other review agencies. Following the ZHM hearing, Petitioners continued to negotiate with the County and Planning Commission staffs, again capitulating to the additional demands of government, many of which went far beyond what was reasonable or rational or legal.[2] During this process, Petitioners also participated in negotiations with the County to resolve a challenge by the Sierra Club to the regional commercial (R/C) Comprehensive Plan land use designation for the Geraci land previously adopted for the Geraci land. These negotiations resulted in an agreement among all parties (the County, the Sierra Club, and the State) for a specific land use designation that would allow the construction of a

2. For purposes of this Petition, the details necessarily are omitted. This case, however, is factually on all fours with *Del Monte Dunes*. The only (non-material) difference is the Geraci land had Sherman fox squirrels, instead of Smith's Blue butterflies.

regional mall of the magnitude proposed by the Petitioners. This settlement agreement was adopted in a Final Order on December 16, 1993, following a specially scheduled public hearing before the Governor and Cabinet of the State of Florida sitting as the Administrative Commission ("Final Order"), pursuant to Florida law.

Also on December 16, 1993, over five years after Forbes-Cohen had first applied to develop the Geraci land, the Geracis' zoning application finally was presented to the Hillsborough County Board of County Commissioners ("Board"). By this date, the Geracis had already agreed to dedicate a conservation area within the project that was not legally required, had agreed to preserve wetlands, had agreed to make numerous, substantial transportation improvements, and otherwise had capitulated on every condition or exaction demanded by Hillsborough County. By then, the Petitioners also had received approval of all twenty-six regional and state review agencies as well as approval of the Hillsborough County staff and the staff of the Planning Commission. At the time of the Board meeting, Petitioners sought approval of a mall project that would allow development of 1.28 million square feet of retail use and 235,000 square feet of office use (due to the County's insistence that the Geracis' "outparcels" be added to the mall DRI project, to which demand the Geracis of course agreed), for a total development of 1,515,000 square feet. Both the retail and the office uses specifically were authorized by the R/C land use designation *already approved* by the County *and* by the terms of the Final Order of the Governor and Cabinet. Standing before the Board for final approval of the zoning and development order, however, the Petitioners ran headlong into harsh opposition by a well-organized, vocal, and politically-active group of residents. At this hearing,

notwithstanding the approval of all the reviewing agencies, their own staff, the Planning Commission staff, and the Final Order, the Board succumbed to the wishes of this politically powerful group of residents and refused to grant Petitioners the rezoning and development order necessary to construct an economically viable mall project.

At the same hearing, the Board then unilaterally stated the only conditions upon which it would again consider approving the project. Although Petitioners were (and are) convinced that they were constitutionally entitled to approval of the project presented to the Board on December 16, 1993, and without waiving their rights to the entire project, Petitioners continued to negotiate with the County and Planning Commission staff, to meet the Board's newest conditions. Subsequently, County staff concluded that Petitioners had substantially complied with all of the additional requests and conditions set forth by the Board and again recommended approval. On March 29, 1994, the revised site plans that had been negotiated with the staff in accordance with the Board's direction were represented to the Board. Again, the Board rejected the Petitioners' concession, with one Commissioner expressing her refusal to consider any approval if the Petitioners were "unwilling to put anything into [the public] trust fund."[3] On May 2,

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3. This was in direct response to the request of the citizen activist group which was demanding that the land not be developed and instead be set aside in a public trust. The Board meeting transcript recites Commissioner Busansky:

> But when we are talking about a conservation easement or when we are talking about protecting open space that's there, we're talking about putting this land in something

(Cont'd)

1994, the Board formally rendered its denial resolution for the rezoning. Moreover, on October 27, 1994, Hillsborough County, in contravention of the Final Order, unilaterally changed the *land use* designation for the Geraci land in a manner which would forever preclude the development proposed by the Petitioners, and would prohibit any development exceeding 650,000 square feet of retail space, a size that the Petitioners contend was economically unviable, as a regional mall, and well below the regional commercial threshold previously approved by the County and the State for the Geraci land.

Finally weary and now painfully aware that the County expected them to donate their land to a "public trust" without compensation, on January 18, 1995, Petitioners sued Hillsborough County and the Department of Community Affairs[4] in the United States District Court for the Middle

(Cont'd)

> like a trust fund. That's what is. That's what it is — just one minute — that's what it is to me. And we are saying "this is our trust fund." And this is our trust fund for that community. And to be so absolutely, adamantly opposed to setting that aside like that just makes me . . . uncomfortable. . . . And I would like to add, in fact, when you come back. If this motion is voted on, that you come back with some kind of discussion about how you want to deal with this. *Because I'm not going to deal with it if you are unwilling to put anything into that trust fund.* That's just where I'm coming from.

(Emphasis added).

4. Although Jan Smith, a member of the Planning Commission, was originally sued in her individual capacity for her participation with the citizen activist group, she, as well as the Planning Commission, itself, was voluntarily dismissed from the case on June 4, 1998. The Department of Community Affairs was made a party solely to enforce the Final Order of the Governor and Cabinet against the County.

District of Florida, alleging that the County violated 42 U.S.C. § 1983 in numerous respects and seeking declaratory and injunctive relief as well as damages and attorney's fees. Petitioners also brought state law claims for equitable estoppel and breach of contract. On April 13, 1998, the Department of Community Affairs filed a Motion for Summary Judgment and on September 22, 1998, Petitioners filed a Motion for Summary Judgment on the breach of contract count. On July 15, 1998, Hillsborough County filed its Motion for Summary Judgment. On September 21, 1998, the Honorable Henry Lee Adams, United States District Judge, granted the Respondents' Motions for Summary Judgment and denied Petitioners' Motion. The District Court based its decision solely on the Eleventh Circuit precedent that now directly conflicts with this Court's decision in *Del Monte Dunes*, as to the substantive due process, equal protection, and due process takings claims.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT HAS LIMITED THE DISTRICT COURT'S DEFERENCE IN EXAMINING LAND-USE DENIALS IN A MANNER THAT FUNDAMENTALLY CONFLICTS WITH THE "HYPOTHETICALLY POSSIBLE" PRECEDENT ESTABLISHED IN THE ELEVENTH CIRCUIT (AND OTHERS) AND APPLIED IN THIS CASE.

In *Del Monte Dunes, supra*, this Court reaffirmed the right of every citizen of the United States to protect their Constitutionally guarded property rights from the arbitrary and capricious action of local governments, affirming the right of each citizen to a jury trial to review the merits of a

land use denial. This Court further recognized that the right to a jury trial would only be meaningful if the citizen could attack, and the local government had to defend, the proffered rationale for the government's denial of property use on the basis of the government's recorded reasons given for the denial.[5] Yet the law of the Eleventh Circuit, applied in the case *sub judice*, denies the property owner a jury trial on the claim that the local government's conduct was arbitrary and capricious; moreover, the Eleventh Circuit precedent allows the trial or appellate court to sustain the conduct of the local government upon the hypothecation *by the court* of any grounds for which the actions *could have been taken*, whether the local government actually considered the reason or not. In *Del Monte Dunes*, this Court sustained a judgment for damages after a jury trial based on legally identical facts to the case *sub judice*; here the Eleventh Circuit dismissed the claim on summary judgment. The cases simply are irreconcilable.

This Court's decision in *Del Monte Dunes*, in reviewing and examining substantive due process claims, clearly defined the respective roles of the District Court and the jury. It also clearly defined the standards a government must satisfy to justify denial of property rights in such land use cases. Addressing the propriety of the instructions submitted to the jury at trial, this Court made clear the jury should determine whether: ". . . the city's decision to reject a

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5. If the local government can rely upon hypothetical afterthoughts to sustain their denial, to which the property owner had no opportunity to respond or correct, one might wonder if procedural due process is being denied as well. This is even more the case when a court (here, the Eleventh Circuit) can itself conjure up hypothetical reasons for denial that even the government could not create.

particular development plan bore a reasonable relationship to its **proffered** justifications." 526 U.S. at 721 (emphasis supplied).[6] Significantly, this Court has identified and limited the role of the trial court to examine only those "legitimate purposes" that were "proffered," "asserted," or "stated" by the governmental agency in support of its decision. This Court's determination of the proper test to be applied not only is controlling, but also the only practical, common sense approach to the issue which comports with a property owner's right to procedural due process in the determination of his constitutionally protected property rights. If government can give any reason whatever without any standard for judicial scrutiny, or if the court can entertain hypothetical after-the-fact justifications, the property owner lacks any procedural ability to address the local government's purported reasons for denying the proposed use of the property at the time the development order decision is made. Surely this is a basic requirement of constitutional due process in this country.

In comparison, the Eleventh Circuit, when reviewing government land use denials that impact constitutionally protected property interests, has continued to use a standard of analysis which makes local government decisions completely invulnerable to any challenge. It does so by supporting a governmental denial as long as any plausible, arguably legitimate purpose could be identified, even if the

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6. The bulk of the *Del Monte Dunes* decision is couched within the framework of the jury's decision supporting the due process claim. Nevertheless, the Court, and, particularly, Judge Scalia's concurring opinion, establishes that the same analogy applies across the board for all due process and equal protection claims under 42 U.S.C. § 1983, when the issue is whether the government's denial of a development order was rationally related to a legitimate government purpose. 526 U.S. at 624 (Scalia, J., concurring).

legislative body never even considered the "plausible" purpose and even if the purpose is only identified by the appellate court on appeal. *See Bannum, Inc. v. City of Fort Lauderdale, Fla.*, 157 F.3d 819 (11th Cir. (Fla.) 1998); *Haves v. City of Miami*, 52 F.3d 918 (11th Cir. (Fla.), 1995); and *Restigouche, Inc. v. Town of Jupiter*, 59 F.3d 1208 (11th Cir. (Fla.), 1995). *Del Monte Dunes*, however, has discredited this impermissibly deferential standard imposed by the Eleventh Circuit, a standard that effectively conferred upon the local planning bodies complete immunity and such a low threshold of review (essentially none) that any decision, no matter how arbitrary or capricious, would be deemed constitutional.

In addition to the Eleventh Circuit, various other circuits have adopted a standard which is hyper-deferential to local governments: the "hypothetically possible" standard of review. The "hypothetically possible" standard of review holds that if an appellate court could find *any* reason to support the local government decision, whether or not the reason was considered by the governing body, the local government's decision is not considered irrational or unconstitutional. *See Pro-Eco, Inc. v. Board of Com'rs*, 57 F.3d 505, 514 (7th Cir. (Kan.), 1995), *cert denied*, 116 S. Ct. 672 (1995); *See also Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence*, 927 F.2d 1111, 1119-20 (10th Cir. (Kan.), 1991). This Court now clearly has rejected this "hypothetically possible" standard of review in *Del Monte Dunes*, and to the extent the Circuits conflict with the *Del Monte Dunes* test, this Court now should expressly overturn the incompatible Circuits. The Eleventh Circuit's disregard of *Del Monte Dunes* in the case *sub judice* amply demonstrates the need for such a mandate.

Justice Scalia, at the *Del Monte Dunes* oral argument, clearly illustrated the guiding principal as to why local government decisions must be subject to some reasonable degree of scrutiny:

> Now let's talk about deference to the city's judgment. I can under — our normal rule is that we do defer and, if there's a rational basis, that's all we look to. But where you have a consistent process, as is alleged here, of turning down one plan, the next plan, the next plan, okay, I'll do this to satisfy you, isn't there some point at which, although there's a rational basis for the fifth decision, a rational basis for the fourth and the third and the second and the first, **you begin to smell a rat**, and at that point can't we say, despite our normal rational basis review, there's some other factor that begins to come in here, and that is, at some point you can say, this is simply unreasonable.

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 1998 WL 721087 (U.S. Oral Arg., Oct. 07, 1998), (97-1235) (emphasis added).[7] *Del Monte Dunes* explicitly outlines the standards a jury must employ to determine the reasonableness of a local government's land use decision: a jury must examine whether the government's decision bore a "reasonable relationship to its proffered justifications." 526 U.S. at 721. More importantly, a local government's

7. In *Del Monte Dunes*, Justice Scalia smelled a rat; in the case *sub judice*, one does not have to resort to "smell." Here the "rat" was an unlawful desire to compel a "public trust" on private land, without compensation, which "rat" was "heard" at the Board hearing and can be "seen" in the transcript of that hearing. *See* note 3, *supra*.

decision must be based on justifications which are offered; district courts and appellate courts will no longer be able to hypothecate the justifications necessary to support a land use decision.[8]

Aggrieved land owners need protection from autonomous local government bodies whose arbitrary and capricious decisions have become impervious to challenge because of the extreme judicial deference given to these decisions. Under the Eleventh Circuit's version of the rational basis test, no evaluation of the evidence is required, because hardly a scenario could ever be presented in which *some* rational basis not could be hypothesized by someone in an "after-the-fact" consideration. Under the *Del Monte Dunes* standard of review, a jury is given the opportunity to undertake meaningful evaluation of the evidence at hand to ensure that a local government's proffered justifications are reasonably related to its decision. The Eleventh Circuit's failure to apply even this deferential standard of review, which itself is very low, is inexplicable after *Del Monte Dunes*.

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8. Regrettably for Petitioners, the Eleventh Circuit in this case inexplicably ignored the impact of *Del Monte Dunes* on their decision *sub judice*. Although *Del Monte Dunes* was rendered after briefs were filed in the Eleventh Circuit, Petitioners filed a Notice of Supplemental Authority and presented the case at oral argument. The panel at oral argument indicated that it had not yet read *Del Monte Dunes*; however, Judge Wilson stated that his law clerk had reviewed the case and that she suggested he inquire of counsel for the County as to whether, in fact, *Del Monte Dunes* overruled Eleventh Circuit precedent regarding land use decisions. Counsel for the County responded that he had not yet read the decision. Inexplicably, the Eleventh Circuit did not mention *Del Monte Dunes* in its opinion, did not attempt to distinguish its contradictory decisions, and denied rehearing on this point.

The *Del Monte Dunes* standard also combats the concerns latent in local land use matters that Bernard H. Seigan aptly describes:

> In zoning matters . . . [c]onsiderations fundamental to the purpose of land-use regulation are swept away as the authorities succumb to their own desires and fears as well as [the desires] of those who exert the most pressure on them.

Economic Liberties and the Constitution 262 (1980) quoted in S. Weiner, "Substantive Due Process in the Twilight Zone: Protecting Property Interests from Arbitrary Land Use Decisions." 69 Temp. L. Rev. 1467 (1996). The standard imposed in *Del Monte Dunes* at least requires local governments to act reasonably, clearly and fairly because such decisions will be subject to review by a judge and ultimately a jury, applying a reasonableness standard of review. As a result, property owners challenging local government land use actions, by knowing the reasons proffered by a local government for its actions, will stand a better chance at defending their constitutional property rights in the event that such rights have been inappropriately trampled, as in this case.

Quite simply, despite the fact that *Del Monte Dunes* is legally indistinguishable from the case at bar, the Eleventh Circuit's immutable "hypothetically possible" threshold effectively precluded Petitioners from presenting for jury consideration the blatant irregularities in the County Commission's proffered reasons,[9] not to mention its real

9. Petitioners effectively and completely refuted the ostensible reasons proffered by the County for its denial with the uncontroverted reports of the County's own staff, the County's own (Cont'd)

reason,[10] nor was a jury selected to hear Petitioner's claims.[11] Petitioners, in this case, were denied any opportunity by the District Court prior to *Del Monte Dunes*, and by the Eleventh Circuit after *Del Monte Dunes*, to determine whether Hillsborough County's decision was rationally related to its proffered justifications. This result is not legally correct and is not fair.

II.

THE ELEVENTH CIRCUIT'S FAILURE TO RECOGNIZE A DUE PROCESS TAKINGS CLAIM DIRECTLY CONFLICTS WITH DECISIONS OF THE SUPREME COURT.

The ruling against Petitioners below was based upon the Eleventh Circuit's decision in *Villas of Lake Jackson v. Leon County*, 121 F.3d 610 (11th Cir. (Fla.), 1997), in which the Eleventh Circuit held that there is no substantive due process takings claim cognizable under 42 U.S.C. § 1983. This

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(Cont'd)
expert consultants, the Planning Commission staff, and twenty-six review agencies, all of whom stated that Petitioners had not only met all legal requirements but also the Board's additional conditions, and unanimously recommended approval.

10. I.e., the ulterior motive to force the Geracis to contribute their land to a "public trust" without compensation. *See* note 3, *supra*.

11. To grant summary judgment in this case not only violated the traditional standard regarding genuine disputes of material fact related to the reasonableness of the County's proffered justifications, but clearly violated the Petitioners' right to trial by jury under *Del Monte Dunes*, *supra*.

holding also directly conflicts with this Court's decision in *Del Monte Dunes*, *supra*.

In *Del Monte Dunes*, this Court affirmed the decision of the Ninth Circuit Court of Appeals and expressly rejected the City's contention that developers could not bring a takings claim under the due process clause of the United States Constitution. This Court stated:

> To the extent the City argues, that as a matter of law, its land use decisions are immune from judicial scrutiny under all circumstances, its position is contrary to settled regulatory takings principals. We reject this claim.

Del Monte Dunes, 526 U.S. at 1637. This Court then affirmed the jury's award as to the due process claim and made abundantly clear that due process takings claims under the Fourteenth Amendment to the United States Constitution are still viable under 42 U.S.C. § 1983. By contrast, in its 1997 decision in *Villas of Lake Jackson*, the Eleventh Circuit specifically held that:

> [O]ther than a due process claim based on arbitrary and capricious action, there is no "substantive due process takings" cause of action . . . separate and apart from a cause of action under the takings clause of the United States Constitution.

121 F.3d at 611. The Eleventh Circuit expressly applied this erroneous analysis in the instant case, notwithstanding *Del Monte Dunes*.

One need look no further than this Court's decision in *Del Monte Dunes* to determine that a substantive due process taking claim does in fact exist. In *Del Monte Dunes*, this Court expressly rejected the Eleventh Circuit's decision in *New Port Largo, Inc. v. Monroe County*, 95 F.3d 1084 (11th Cir. 1986), which denied a developer a jury trial for a takings claim. Instead, this Court agreed with the Ninth Circuit that developers are entitled to have a jury determine the "reasonableness" of the relationship between the proffered "legitimate action," and the decision to deny the development application. *Del Monte Dunes* makes clear, contrary to the precedent established in the Eleventh Circuit, that property owners are entitled not only to bring due process takings claims under 42 U.S.C. § 1983, but also that they are entitled to a jury trial on that claim.

It is apparent from the Eleventh Circuit's disregard of *Del Monte Dunes* in this case that the Circuits need clear, consistent and direct guidance as to this issue of whether a due process takings claim exists. The Circuits are in flux. The Eleventh Circuit has inappropriately obliterated an aggrieved land owner's ability to bring a substantive due process claim under the Fourteenth Amendment separate and apart from a cause of action under the Fifth Amendment takings clause. *See Villas of Lake Jackson*, 121 F.3d at 611; also, the case *sub judice*. In *Del Monte Dunes* this Court clearly held that a cause of action exists for a due process taking in the area of land use under 42 U.S.C. § 1983 and the Fourteenth Amendment. The Eleventh Circuit's decision and its patent conflict with this Court's decision in *Del Monte Dunes* pose a great risk of seriously complicating the adjudication of due process takings claims in federal courts. Other Circuits and District Courts called to address this issue will be faced with two squarely inconsistent decisions, the

Eleventh Circuit's bold abjuration of any substantive due process takings claim and this Court's recognition of such a claim.

As to the substance of the issue, this Court has consistently rejected the view that the applicability of one constitutional amendment necessarily preempts the guarantees of another. *United States v. James Daniel Good Real Property*, 510 U.S. 43, 49 (1993). Moreover, this Court has opined that a particular action may implicate more than one constitutional protection. *See Sodal v. Cook County, Ill.*, 506 U.S. 56, 70 (1992) ("Certain wrongs affect more than one single right and, accordingly, can implicate more than one of the Constitution's commands. Where such multiple violations are alleged, we are not in the habit of identifying as a preliminary matter the claim's 'dominant' character. Rather, we examine each constitutional provision in turn.") Based on this Court's analysis, the fact the takings clause of the United States Constitution may apply to particular situation does not mean that all substantive due process guarantees are no longer in effect. *See John Corporation v. City of Houston*, 214 F.3d 573 (5th Cir. (Tex.), 2000). Therefore, the reasoning posited by the Eleventh Circuit, by wholly rejecting due process takings claims under the Fourteenth Amendment and 42 U.S.C. § 1983 before evaluating the possibility of such a claim, conflicts with *Del Monte Dunes*.

Confusion spawned by holdings of the Eleventh Circuit has already penetrated the Fifth Circuit. Recently, a Texas District Court tried to apply a blanket rule that the takings clause eliminates a substantive due process claim relating to the deprivation of private property. *See John Corporation v. City of Houston*, 214 F.3d 573 (5th Cir. 2000). The Fifth

Circuit, however, soundly rejected such an overreaching pronouncement, and clearly stated that: "[A] careful analysis must be undertaken to assess the extent to which a plaintiff's substantive due process claim rests on protections that are also afforded by the Takings Clause" and in the proper case, by alternative constitutional protections. *John Corporation*, 214 F.3d at 583. The Fifth Circuit also stated that the takings clause does not subsume all substantive due process claims related to the deprivation of property. *Id.* at 582. Therefore, consistent with the law of this Court, a due process takings claim under the Fourteenth Amendment and 42 U.S.C. § 1983 may exist independently of a claim under the takings clause and a court must assess each claim independently to review its viability, a stark contrast to the holdings of the Eleventh Circuit, including the case *sub judice*.

It is clear that this Court's recognition that an aggrieved property owner can bring a substantive due process takings claim under 42 U.S.C. § 1983 contradicts the case law in the Eleventh Circuit. This Court's decision in *Del Monte Dunes* emphasizes that District Courts and Courts of Appeal cannot readily dismiss a substantive due process claim related to the deprivation of property under the Fourteenth Amendment based on a plenary rule of law that the takings clause eliminates such claims. Such a rule is inaccurate and inappropriate in light of *Del Monte Dunes*. Instead, this Court, by recognizing the existence of a due process takings claim, requires a more meaningful review of the merits of the claim raised by aggrieved property owners. Each constitutional protection must be examined in turn. Furthermore, a jury must decide the reasonableness of the local government action. The holding of the Eleventh Circuit in the case *sub judice* is untenable with this Court's decision

in *Del Monte Dunes*. This Court should: (i) firmly and clearly reiterate its holding in *Del Monte Dunes*, that an aggrieved property may bring a due process takings claim under 42 U.S.C. § 1983 that is subject to jury review; (ii) expressly overrule the Eleventh Circuit precedent to the contrary; and (iii) mandate the Eleventh Circuit to apply it to this case.[12]

III.

THIS QUESTION IS IMPORTANT

In *Del Monte Dunes* this Court reaffirmed and continued its reasonable protection of property owners deprived of use of their property[13] when this Court recognized the existence of a due process takings claim to challenge local land use decisions. However, this Court's recognition of such a claim will prevent injustice only if those Circuits (including the Eleventh) who have long held otherwise are compelled to

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12. Petitioners recognize that, given the clear holding of *Del Monte Dunes*, this should not be necessary. However, Petitioners simply could not get the Eleventh Circuit to consider the obvious implications of *Del Monte Dunes* upon their case. Petitioners have a substantial claim (approximately $200 Million) and have been denied their day in court, before a jury of their peers, against an oppressive local government who had an ulterior, if not hidden, agenda. Also *see* note 3, *supra*. To allow the Eleventh Circuit's decision, below, to stand will validate the completely unfettered ability of government to trample property owners who not only smell a rat, but even those who hear the rat, see the rat, and expose the rat.

13. *See, e.g.*, *First English Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304 (1987); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Dolan v. Tigard*, 512 U.S. 374 (1994); *Situm v. Tahoe Regional Planning Council*, 520 U.S. 725 (1997).

follow the law of the land. In its decision in *Del Monte Dunes,* this Court recognized the existence of several types of alternative federal claims for property deprivation, including a just compensation takings claim under the Fifth Amendment, a due process takings claim and a regulatory takings claim. At times, however, federal and state courts have interchanged these claims, recognizing some claims and rejecting other claims, leading to inconsistent and confusing results. This Court, therefore, needs to clearly articulate to property owners, local governments, planning agencies and the various state and federal courts the subtleties inherent in these types of property claims. Given the rapidly changing state of land use law governing development in this nation, many more issues regarding the rights of property owners will arise over the next several years. Without proper guidance, the extent of confusion and inconsistency in state and federal court decisions will multiply. The Eleventh Circuit's decision in the case *sub judice* amply demonstrates that the direction has not yet been made sufficiently clear. This Court should once again take the initiative to harmonize the many different and difficult rules of law speckled across the nation so that two land owners with similar rights facing similar government actions will come out with similar and fair results.

CONCLUSION

This petition for writ of certiorari should be granted to resolve a blatant conflict among the Circuits, to compel the Eleventh Circuit to apply *Del Monte Dunes* to overrule its contrary precedent, to provide clear guidance to both federal and state courts as to the existence of a substantive due process takings claim and the appropriate standard of review for such land use claims, and to prevent a grave injustice in this case.

Respectfully submitted,

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APPENDIX

APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED MAY 19, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-3640

D. C. Docket No. 95-00050-CIV-T-25B

ADVANCE LEASING AND DEVELOPMENT, INC., PETER A. GERACI, ROY N. GERACI,

Plaintiffs-Appellants,

versus

CHRIS HART, in his official capacity as a Commissioner of Hillsborough County, JOSEPH CHILLURA, in his official capacity as a Commissioner of Hillsborough County, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(May 19, 2000)

Before EDMONDSON, DUBINA and WILSON, Circuit Judges.

Appendix A

PER CURIAM:

This appeal arises from a land-use controversy. Plaintiffs are would-be developers. The district court granted Defendants summary judgment. Briefly stated, the case presents these issues:

1. Was it error to grant summary judgment for Defendants on Plaintiff's substantive due process claim?

2. Was it error to grant summary judgment for Defendants on Plaintiff's equal protection claim?

3. Was it error to grant summary judgment for Defendants on Plaintiff's due process takings claim?

4. Was it error to grant summary judgment for Defendants on Plaintiff's impairment of contract claim?

5. Was it error to grant summary judgment for Defendants on Plaintiff's procedural due process claim?

The district court wrote an extensive opinion and order.

No reversible error has been demonstrated. The judgment of the district court is AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION DATED AND FILED SEPTEMBER 21, 1998

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 95-50-CIV-T-25B

ADVANCE LEASING AND DEVELOPMENT, INC., a Florida corporation, **PETER A. GERACI**, and **ROY N. GERACI**,

Plaintiffs,

v.

CHRIS HART, in his official capacity as a Commissioner of Hillsborough County, et al.,

Defendants.

ORDER

THIS CAUSE is before the Court on Defendant Murley's Motion for Summary Judgment (Dkt.177), Plaintiff's Motion for Summary Judgment on Count VII (Dkt.189), Defendant Murley's Motions for Judicial Notice (Dkts.212,288), Defendants' Motion for Summary Judgment on Counts I-VII (Dkt.236), Defendants' Motion to Dismiss Count VII (Dkt.240), Defendants' Motion to Dismiss Count III (Dkt.250), and Defendants' Motion to Dismiss Counts I

and II (Dkt.261). Upon consideration of said motions and responses, the file herein, and otherwise being fully advised, the Court finds as follows.

I. FACTS

The facts herein are well known to the parties and have been cited repeatedly in various motions and memoranda filed in this case (*See* Dkts.1,177,189,240,250,261). In summary, this case pertains to a failed land use redesignation application. Advance Leasing, successor to Forbes Cohen Development Corporation, desired to construct a large commercial mall on the corner of Dale Mabry Highway and Van Dyke Road in Hillsborough County. Plaintiffs sought to change the land use designation, and to that end expended large sums in testing and analysis of the property as required by various local agencies and departments. After several months in this process, Plaintiffs negotiated with the County, Department of Community Relations and the Sierra Club, to redesignate Plaintiffs' property in the Comprehensive Land Use Plan of Hillsborough County as "Urban Mixed Use," consistent with Plaintiffs' planned use of the property.

The Governor and the Administration Commission entered a Final Order recommending implementation of Plaintiffs' proposed designation. The Board of County Commissioners, however, ultimately decided to down plan Plaintiffs' property from an "Urban Mixed Use" to a "Community Mixed Use" designation. Plaintiffs now contend that they will be precluded from constructing the intended mall, and it would be impossible to find a similar site for the proposed mall. Plaintiffs have sued the Board of

County Commissioners and the State of Florida for various state and federal causes of action based on the denial of their rezoning application.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is not appropriate unless the pleadings, depositions, answers to interrogatories, affidavits, and admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Celotex v. Catrett*, 477 U.S. 317 (1986); Fed. R. Civ. P. 56. The moving party satisfies its burden by showing an absence of evidence to support an essential element of the nonmoving party's case. *Celotex*, 477 U.S. 317. Once the moving party demonstrates the absence of a genuine material fact, whether or not accompanied by affidavits or other proof, the nonmoving party must "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.' " *Celotex*, 477 U.S. at 324 (quoting Fed. R. Civ. P. 56(e)); *Hoffman v. Allied Corp.*, 912 F.2d 1379, 1382 (11th Cir. 1990). A plaintiff cannot prevent judgment by merely resting on the conclusory allegations of her pleadings, or on the basis of conjecture, suspicion, or surmise. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). Hence a plaintiff must come forth with significantly probative evidence to support her claims. *Id.*

Appendix B

III. FEDERAL CLAIMS

A. COUNT I — SUBSTANTIVE DUE PROCESS

1. Motion to Dismiss (Counts I and II)

The County moves to dismiss Counts I and II on the grounds that the Court must abstain due to pending state administrative proceedings. Based on the record herein, it appears that Plaintiffs have dismissed their petition in the administrative proceedings. As to the County's argument under the finality doctrine that Plaintiffs' claims are not ripe, this Court previously found that Plaintiffs' due process takings claim was ripe for review. (*See* Dkt.55 at 3-4). Similarly, the Court finds Counts I and II ripe for consideration.

2. Summary Judgment

Plaintiffs bring Count I pursuant to 42 U.S.C. § 1983 contending that the County's actions have violated their substantive due process rights. The County moves for summary judgment as to Count I on the grounds that: (1) Plaintiffs have no constitutionally protected property right to rezoning; (2) Plaintiffs complain of quasi-judicial acts which do not support a substantive due process claim; and (3) the County's action was rationally related to a legitimate government purpose.

In order to establish a substantive due process claim, Plaintiffs must show that they had a constitutionally protectible property interest, and that the County deprived

Plaintiffs of that interest by means that were " 'pretextual, arbitrary and capricious, and without any rational basis.' "[1] *Reserve, Ltd. v. Town of Longboat Key*, 17 F.3d 1374, 1379 (11th Cir. 1994) (quoting *Hearn v. City of Gainesville*, 688 F.2d 1328, 1332 (11th Cir. 1982)).[2]

Defendants cite *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994), for the proposition that the County's actions were quasi-judicial, and thus not the proper subject of a substantive due process claim. In *McKinney* the Eleventh Circuit considered the substantive due process claim of a County employee who claimed he was terminated unfairly. In its opinion, the Court stated that substantive due process protection applies only to rights created by the Constitution, and not those that arise under state law, such as tort and

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1. The Court declines to apply the authority urged by Plaintiffs. In *Board of County Commrs. v. Snyder*, 627 So.2d 469 (Fla. 1993), the Florida Supreme Court alluded to "constitutional rights," but did not purport to assess a federal substantive due process claim pursuant to 42 U.S.C. § 1983. Likewise, the United States Supreme Court decision in *Dolan v. City of Tigard*, 512 U.S. 374 (1994) approved of various analysis used by state courts in evaluating Fifth Amendment Takings Claims, not substantive due process claims.

2. The Court notes that *Hearn* was overruled in *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994), and in fact, the County relies on *McKinney* for the proposition that Plaintiffs may not bring a substantive due process claim. For the reasons stated *infra*, however, the Court concludes that *McKinney* does not bar Plaintiffs' substantive due process claim. *See, e.g. New Port Largo Inc. v. Monroe County*, 95 F.3d 1084, 1091 (11th Cir. 1996); *and Villas of Lake Jackson, Ltd. v. Lee County*, 121 F.3d 610, 614 (11th Cir. 1997).

employment law. *Id.* at 1557. The Court expanded on its distinction between substantive and procedural due process rights, noting *inter alia* that substantive due process rights are protected " 'against certain government actions regardless of the fairness of the procedures used to implement them' " *Id.* at 1556 (quoting *Collins v. City of Harker Hts.*, 503 U.S. 115 (1992)). In a footnote, the Court distinguished between "legislative" acts, which generally apply to a large segment of society, and "executive" acts, which arise from the administrative activities of members of the executive branch, suggesting that substantive due process protection only applies to legislative acts. *See McKinney*, 20 F.3d at 1557 n.9.

The language of *McKinney* therefore arguably provides support for Defendant's position that Plaintiffs' complaint arises from an executive rather than legislative act and is therefore barred. Nevertheless, the Eleventh Circuit has applied the substantive due process analysis in land use cases subsequent to *McKinney*. *See New Port Largo, Inc.*, 95 F.3d at 1091; *see also Restigouche, Inc. v. Town of Jupiter*, 59 F.3d 1208, 1213-14 (11th Cir. 1995); *cf. also Villas of Lake Jackson*, 121 F.3d at 614 ("[a]ssuming . . . that the district court was correct in classifying the down-zoning as a legislative rather than executive act . . ."). Based on the above cases, the Court concludes that *McKinney v. Pate* does not preclude Plaintiffs' substantive due process claim.

Defendants next contend that Plaintiffs lack a vested, property interest in rezoning to build a commercial mall. The Eleventh Circuit has found various circumstances in which a plaintiff may have a protectible property interest. *See id.*

(protectible interest in building permit); *see also Spence v. Zimmerman*, 873 F.2d 256 (11th Cir. 1989) (protectible interest in building permit where municipality lacks discretion to deny permit to applicant who satisfies statutory requirements); *and see Villas of Lake Jackson, Ltd. v. Leon County*, 796 F. Supp. 1477, 1490 (N.D. Fla. 1992) (protectible interest in building permit where circumstances give rise to the doctrine of equitable estoppel) (cited by *Reserve, Ltd. v. Town of Longboat Key*). In this case the Court agrees that Plaintiffs have not shown a vested interest in the redesignation of their property in the Comprehensive Plan. Plaintiffs did not rely on existing zoning, but claim that they acquired a vested interest in redesignation which would lead to the rezoning of their property in the future. Viewing the facts in the light most favorable to Plaintiffs, the Court does not find that Plaintiffs had a vested right to the redesignation of their property, under an estoppel or any other theory.

Further, even assuming Plaintiffs acquired a vested interest, Plaintiffs have not raised an issue of material fact as to whether the County's actions were arbitrary and capricious. Plaintiffs assert that their proposed project ultimately complied with all aspects of the Comprehensive Plan and Land Development Code, and the County's rejection of the plan after repeated requests to redesign their plan and submit new data was arbitrary and capricious. Nevertheless, Plaintiffs have not provided any evidence to show that the County's actions were not rationally related to a legitimate purpose, that of "promoting compatibility with surrounding rural and residential uses, of protecting the environment, and/or avoiding traffic congestions and hazards." (Dkt.236 at 4). Plaintiffs have not shown evidence,

beyond mere suspicion, that they were targeted for selective treatment. *Compare Reserve, Ltd.*, 17 F.3d at 1374. Accordingly, the County's motion is granted as to Count I.

B. COUNT II — EQUAL PROTECTION

To prevail on their as-applied claim of equal protection, Plaintiffs must show that they were treated differently from similarly situated persons and that the County unequally applied the zoning laws for the purpose of discriminating against Plaintiffs. *See GJR Investments, Inc. v. County of Escambia*, 132 F.3d 1359, 1367 (11th Cir. 1998) (citing *Strickland v. Alderman*, 74 F.3d 260, 264 (11th Cir. 1996). The County contends that other projects were inherently different from that proposed by Plaintiffs, therefore, Plaintiffs have shown no similarly situated applicants who were treated differently.[3]

In their response to the County's motion, Plaintiffs argue that the similarity analysis focuses on the claimant and not the property. It appears that the cases discussing equal protection have evaluated both the claimants and the property, depending on the circumstances.[4] Nevertheless,

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3. For example, Defendants assert that the Citrus Park Mall, close in proximity to Plaintiffs' proposed mall site, involved aggregated parcels, whereas Plaintiffs' proposed development carved up a parcel and created planning problems. (Dkt.236 at 6, Gersholwitz Depo. (Dkt.192) at 187-189).

4. *See, e.g., G.J.R. Investments, Inc.*, 132 F.3d at 1367-68 (finding that the plaintiff failed to allege that a similarly situated

(Cont'd)

Appendix B

Plaintiffs proffer no specific claimants or projects which they allege are similarly situated. Rather, Plaintiffs conclude that the record in this case contains evidence of disparate treatment. (*See* Dkt.252 at 10). Among the items referenced is the deposition of Advance Leasing corporate representative William Ockunzzi, who states that in his opinion "the record"[5] of other projects shows that the County required excessive documentation, study and investigation of Plaintiffs' proposed project. (*See* Dkt.217 at 55-57).[6] Ockunzzi opines that those projects, which he asserts were less likely to have been approved, were handled with considerably less effort on the part of the applicant. (*See id*).

(Cont'd)
developer was denied a permit); *Villas of Lake Jackson, Ltd.*, 121 F.3d at 614 (affirming trial court's grant of summary judgment on equal protection claim based on "undisputed evidence of the unique aspects of the tract as contrasted to other assertedly similarly situated properties"); *Reserve, Ltd.*, 17 F.3d at 1381 (noting that the plaintiff had created an issue of fact as to whether plaintiff had been treated differently than other similarly situated developers); *and cf. Executive 100, Inc. v. Martin County*, 922 F.2d 1536, 1541 (11th Cir. 1991) (noting that plaintiffs properly alleged that defendants treated them differently from other similarly situated "landowners along Interstate 95").

5. Ockunzzi appears to refer generally to the public record of the rezoning files of Hillsborough County regarding this and other proposed projects. (*See* Depo. at 6).

6. Ockunzzi states that the other projects were the Tri-County Business Park with which he was personally involved, and the Citrus Park Mall and Brandon Towne Center, of which he had no personal knowledge or involvement.

The Court finds that Plaintiffs have not provided a single instance in which a similarly situated claimant was treated differently. Plaintiffs do not refer to any similar claimants, and fail to explain how the projects referenced in the record were similarly situated to that of Plaintiffs. Merely listing other projects and asserting that it is likely they were treated differently does not create a genuine issue of material fact as to whether they were similarly situated. Summary judgment is therefore appropriate on Plaintiffs' equal protection claim.

C. COUNT IV — DUE PROCESS TAKINGS

Plaintiffs concede that their due process taking claim is no longer viable in light of *Villas of Lake Jackson, Ltd. v. Leon County*, 121 F.3d 610, 612 (11th Cir. 1997). Accordingly, Defendants' motion for summary judgment is granted as to Count IV.

D. COUNTS V — CONTRACTS CLAUSE

Plaintiffs seek damages and injunctive relief pursuant to 42 U.S.C. § 1983 for the County's alleged impairment of contracts between the Geracis and Forbes Cohen, the Geracis and Advance Leasing, and Plaintiffs and Hillsborough County. (Complaint at 56-58). Additionally, Plaintiffs have moved for summary judgment on Count VII, their breach of contract claim. Defendants move for summary judgment on the grounds that, *inter alia*, there was no contract between Plaintiffs and Hillsborough County, that any such contract would be void as contract zoning, and that the Administration Commission has determined that the County has complied with the Final Order.

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The Contracts Clause provides that "[n]o State shall . . . pass any . . . [l]aw impairing the [o]bligation of [c]ontracts." U.S. Const. Art. I § 10, cl. 1. Before a claim may be pursued under the Contracts Clause, the existence of a contract must first be established. *See Rhode Island Laborers' Dist. v. State of Rhode Island*, 145 F.3d 42, 43 (1st Cir. 1998); *see also Conway v. Sorrell*, 894 F. Supp. 794, 799 (D. Ver. 1995) (citing *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938)). In support of their claim that a contract exists between Plaintiffs and the County, Plaintiffs refer to the Final Order which Plaintiffs allege contains the terms of a "valid binding Settlement Agreement" between Plaintiffs, Hillsborough County, the Department of Community Affairs, and the Sierra Club. (Dkt.252). The Final Order does refer to a Settlement Agreement, but the Order does not in itself purport to be an agreement, nor can the Court infer an agreement from the language and circumstances. *See Rhode Island Laborers'*, 145 F.3d at 799; (*See* Dkt.1, Exh.H). Without a valid contract, Plaintiffs cannot prevail on their Contracts Clause claim under Article I. Plaintiffs' motion for summary judgment is denied and the County's motion is granted.

E. COUNT VI — PROCEDURAL DUE PROCESS — TURANCHIK RECUSAL

Plaintiffs allege in their Complaint that Commissioner Ed Turanchik was a former Sierra Club attorney and therefore possessed a conflict of interest which tainted the County's decision and denied Plaintiffs due process. To avoid the consequences of *McKinney v. Pate*, Plaintiffs' claim that the general procedural remedies provided by the State of Florida

are inadequate to remedy the defect. Nevertheless, in terms of procedural due process, *McKinney* is clear that Plaintiffs should have availed themselves of the state remedy, or shown that the State *refused* to provide a remedy. *See id.* Although Plaintiffs challenged the denial of their application in an administrative proceeding, Plaintiffs have withdrawn their appeal. (*See* Dkt.250, Exh.E). Because Plaintiffs have not shown that the State of Florida refused to provide a remedy, Plaintiffs' procedural due process claim must fail.

F. COUNT VIII — INJUNCTION

In Count VIII Plaintiffs seek an injunction pursuant to 42 U.S.C. § 1983 to prevent the State of Florida from ratifying the County's decision to downplan the property herein, to order the State to find the downplanning illegal, and to order Hillsborough County to adopt the amendments to the Comprehensive Plan urged by Plaintiffs. Defendant Murley, in his capacity as Secretary of the Department of Community Affairs for the State of Florida, moves for summary judgment on several grounds. Count VIII appears to present claims under substantive and procedural due process, takings, and the Contracts Clause. Because the Court's disposition of the above claims asserted against the County is equally applicable to Defendant Murley, summary judgment should be granted as to Count VIII. Accordingly, Defendant Murley's motion for summary judgment is granted.

IV. PENDENT STATE LAW CLAIMS

In Counts III and VII Plaintiffs raise claims of equitable estoppel and breach of contract. As no federal claims remain

in this case, the Court declines to exercise jurisdiction over these purely state law claims. Counts III and VII are dismissed.

V. CONCLUSION

Consistent with the foregoing, it is **ORDERED**:

1. Defendants' Motion for Summary Judgment on Counts I-VII (Dkt.236) is **GRANTED** as to Counts I, II, IV, V, and VI, and the Clerk is directed to enter judgment for said Defendants on said Counts;

2. Defendant Murley's Motions to Take Judicial Notice (Dkts.212,288) are **GRANTED**;

3. Defendant Murley's Motion for Summary Judgment on Count VIII is **GRANTED**, and the Clerk is directed to enter judgment for said Defendant;

4. Plaintiffs' Motion for Summary Judgment on Count VII (Dkt.189) is **DENIED**;

5. Defendants' Motions to Dismiss (Dkts.240,250,261) are **DENIED**;

6. Counts III and VII are hereby **DISMISSED**;

7. The Clerk is directed to terminate all other pending motions.

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DONE AND ORDERED at Tampa, Florida this 21 day of September, 1998.

s/ Henry Lee Adams, Jr.
HENRY LEE ADAMS, JR.
UNITED STATES DISTRICT COURT

APPENDIX C — PER CURIAM ORDER OF THE *UNITED STATES COURT OF APPEALS FOR THE* ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JULY 24, 2000

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 98-3640-AA

ADVANCE LEASING AND DEVELOPMENT, INC., PETER A. GERACI, ROY N. GERACI,

Plaintiffs-Appellants,

versus

CHRIS HART, in his official capacity as a Commissioner of Hillsborough County, JOSEPH CHILLURA, in his official capacity as a Commissioner of Hillsborough County, et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC (Opinion _____, 11th Cir., 19__, __ F.2d __).

Before: EDMONDSON, DUBINA and WILSON, Circuit Judges.